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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BERNARD P., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD P.,

Defendant and Appellant.

D055426

(Super. Ct. No. JI96519)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza and James H. Lauer, Referee Pro Tem, Judges. Affirmed.

Bernard P. was continued as a ward of the juvenile court under Welfare and Institutions Code section 602 after the court entered a true finding that in May 2009 Bernard committed battery upon a classmate (Pen. Code, § 242). The court lifted and imposed a previously stayed 150-day commitment to Breaking Cycles for an assesment, to be followed by camp and/or a return home, as determined by the assesment.

Bernard's sole contention on appeal is that insufficient evidence supports the court's true finding that he committed the battery. We disagree and, accordingly, affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In May 2009 Victor A., a high school ninth-grader, was eating lunch with others in front of the school cafeteria when he was slapped in the face from behind with potatoes. Victor felt dizzy and almost fell, but regained his balance and looked back to see Bernard, with whom he was acquainted from second period class, and another student laughing and walking away. Victor and Bernard were not friends, but neither Bernard nor his friends had previously "picked on" Victor.

Victor sat down, cleaned himself off and then went to his next class, physical education. There, unable to control his anger, Victor started hitting the wall, screaming and crying. His coach called the school nurse, and Victor went to the nurse's office.

Over the school radio, Officer Gresham, the campus police officer assigned to the high school, heard that the school nurse was responding to a call from physical education. Officer Gresham went to the nurse's office to see if there was a need for assistance.

Upon his arrival at the nurse's office Officer Gresham saw Victor, who appeared very upset. Officer Gresham asked Victor why he was upset. In response, Victor said he was sitting having lunch with his friends when a student came up and slapped him in the face with "tater tots." Officer Gresham then asked Victor if he knew who hit him, to which Victor responded "Bernard P[.]" Victor told Officer Gresham he was sure it was Bernard "because I have class with him." Shortly afterwards, Officer Gresham put a

school photo book on a table and said to Victor, "Show me the student that you say hit you." Victor "pointed straight to Bernard's picture and said, 'That's the guy.'" At no point during Officer Gresham's interaction with Victor did he mention anyone else's involvement in the incident.

Bernard was called to Officer Gresham's office and, although the record is not entirely clear, Bernard apparently was later suspended. As is customary when students are suspended, a separate investigation for the school administration was conducted. For this investigation, Victor was asked to, and did, submit a written incident report.¹ In the report, Victor said he was hit in the face with food, turned around and saw Bernard and one of his friends. Victor "didn't say exactly" that it was Bernard who hit him.

Approximately a week after the incident, a girl purporting to be Bernard's sister, approached Victor and told him that Bernard was in jail and was going to miss his birthday. A few days later, the girl again contacted Victor and told him that the court did not let Bernard out of custody. One time, the girl approached Victor with another young woman purporting to be Bernard's cousin. Although Victor was not threatened, he was approached three times by young women purporting to be members of Bernard's family. Bernard does not have a sister or cousin attending his high school.

A petition was filed in juvenile court alleging Bernard came within Welfare and Institutions Code section 602 because he committed battery on Victor in violation of Penal Code section 242. It was further alleged that a previous disposition of probation

¹ Victor's report is not contained in the record.

for Bernard had been ineffective within the meaning of Welfare and Institutions Code section 777. Bernard was detained pending a jurisdictional hearing.

At the jurisdictional hearing, Victor testified that he told Officer Gresham there were two individuals involved in the incident, and it would surprise him to learn the officer wrote a report stating Victor had said only one person was involved. If the officer did write such a report, that would not be correct. Victor testified that he "wasn't sure who [hit him]. I only knew Bernard, and he was with someone else, but I didn't know who he was."

The court ruled that the allegations of the petition were proved beyond a reasonable doubt, stating:

"What we have here is that someone hit Victor [A.] and after it happened, he was very upset, and, according to the officer, he identified [Bernard] as the person who hit him, and, according to the officer, he didn't identify anyone else, didn't mention anyone else. And there was no evidence presented to the court that he had identified or mentioned anyone else.

"What was also presented was that [Victor] now says he's not saying today, positively, that it was [Bernard] who hit him. We also have evidence that Victor was contacted by one or two girls about this incident He had contact three times, he's not afraid of retaliation, and he wasn't threatened.

"So what's been focused on here is, why the change? Is he fearful? Is he concerned about retaliation? I don't think that's the only consideration. . . . That may be a factor, but, also they might be persuaded that this person has suffered enough. Because the approach is not, you know, something is going to happen to you; rather, it was the girls approaching him, and it was more to feel sorry for him. . . . So I am taking that into account in evaluating whether or not there is an explanation for the change in the account. So I think, given all of that, the People have met their burden of proof."

II

DISCUSSION

The only evidence supporting the conviction is Victor's out-of-court identification of Bernard to Officer Gresham, which Victor repudiated at trial. The issue presented is whether this evidence is sufficient to support the order sustaining the petition for battery.²

To evaluate the claim, we determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, citing *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Substantial evidence is ""evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "[T]he relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that" Bernard committed the battery upon Victor. (*People v.*

² A battery is the willful and unlawful use of force or violence on the person of another. (Pen. Code, § 242; *People v. Duchon* (1958) 165 Cal.App.2d 690, 693.)

Perez (1992) 2 Cal.4th 1117, 1127; *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1079-1080 [same standard for review of a challenge to the sufficiency of the evidence to support a true finding in a juvenile delinquency matter].) Applying this standard, we determine that sufficient evidence supports the court's finding that it was Bernard who battered Victor.

Under appropriate circumstances, an out-of-court eyewitness identification can alone serve as substantial evidence to support a conviction. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 261 (*Cuevas*) [overruling *People v. Gould* (1960) 54 Cal.2d 621, which had established the rule that an out-of-court identification, without corroboration, by itself was insufficient as a matter of law to support a conviction].) The probative value of the identification is to be evaluated under the substantial evidence standard, and may be affected by such circumstances as "(1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime." (*Cuevas*, at pp. 257, 267.) Generally, "an out-of court identification . . . has greater probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification." (*Id.* at p. 265, italics omitted.)³

³ Various safeguards are available to prevent an unjust conviction from an out-of-court identification, including "the availability of the identifying witness for cross-examination, the opportunity of the defense to present other evidence questioning the

Here, the circumstances of Victor's identification of Bernard to Officer Gresham render the identification reliable and give it significant probative value. Victor had prior familiarity with Bernard, as they were classmates. Victor's description of Bernard was detailed and accurate: examining the photo book given to him by Officer Gresham, Victor "pointed straight to Bernard's picture and said, 'That's the guy.'" Victor was not confused, did not equivocate and identified no one else as being involved in the incident. Victor had no motive to falsely identify Bernard, as neither Bernard nor his friends had previously "picked on" Victor. There also was no evidence that Officer Gresham coerced Victor into identifying Bernard as the one who hit him. Although Victor disowned his out-of-court identification when testifying at the jurisdictional hearing, the prosecution offered evidence that he had a motive to falsely recant his statement: Victor had three times been approached by girls purporting to be members of Bernard's family who played on Victor's sympathies.

We reject Bernard's suggestion that Victor's severe upset at the sudden unexpected violence and his blow to the head render his statement to Officer Gresham unreliable. Although the stress to which someone is subjected is one of many factors to be considered by the trier of fact in determining the weight to be given to eyewitness identification testimony, it does not render such testimony inherently unreliable. (See, CALJIC No. 2.92; *People v. Wright* (1988) 45 Cal.3d 1126, 1141 [improper to instruct jury on the impact of the psychological factors listed as relevant to eyewitness

reliability of the out-of-court identification . . . , and the requirement that substantial evidence support the conviction." (*Cuevas, supra*, 12 Cal.4th at p. 274.)

identification as it would invade the province of the fact finder].) Here it was for the court to assess the impact of stress on Victor's identification of Bernard to Officer Gresham, not this court. A rational trier of fact could conclude that despite the emotional and physical trauma caused by the incident, Victor's out-of-court identification of Bernard to Officer Gresham was credible. (*People v. Smith* (2005) 37 Cal.4th 733, 739 [reviewing court ""must accord due deference to the trier of fact and not substitute [its] evaluation of a witness's credibility for that of the fact finder""].)

Similarly, we reject Bernard's argument that Victor's written report to school administrative authorities renders his statement to Officer Gresham unreliable. Although Bernard's argument is not entirely clear, he appears to take the position that Victor's out-of-court identification was not objectively reasonable, and did not constitute substantial evidence, because Victor's written report submitted the same day to school authorities "fingered appellant not as the assailant, but merely as the person more well-known to [him]." Bernard overstates the strength of the record on this point. Victor's written report is not contained in the record, and his recollection of its content was not clear. When asked what he wrote, Victor responded, "I wrote that I was sitting at lunch with one of my friends, and I was suddenly hit in the face with food items. I turned around, and I saw Bernard and one of his friends, I think — I don't know." When asked specifically whether he wrote that Bernard hit him, Victor said, "No, no I didn't. I only said that I was hit, but I didn't exactly say that it was him." Given the equivocal nature of Victor's testimony on this point, a reasonable trier of fact could conclude that Officer Gresham's

testimony regarding Victor's earlier identification of Bernard as the assailant was more believable.

While we may not have reached the same decision as the trial court were we presented with the evidence in the first instance, on appellate review we cannot say that no rational trier of fact could have been persuaded beyond a reasonable doubt that Bernard committed the battery upon Victor. Accordingly, we affirm.

DISPOSTION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P.J.

McDONALD, J.